

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 21, 2007

JULIA LEIGH TOMES v. TIMOTHY LEE TOMES

**Appeal from the Circuit Court for Davidson County
No. 05D-3044 Muriel Robinson, Judge**

No. M2006-01799-COA-R3-CV - Filed November 29, 2007

Husband appeals the trial court's interpretation of provisions in a marital dissolution agreement governing distribution of home sale proceeds and payment of debt. Finding the agreement to be ambiguous, the trial court heard evidence on the parties' intent and found Husband was responsible for the second mortgage. Agreeing that the agreement is ambiguous, based on evidence provided at the hearing, we find the agreement contemplated that Husband was to pay the second mortgage. Consequently, the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Penny Harrington, Nashville, Tennessee, for the appellant, Timothy Lee Tomes.

Mary Frances Lyle, Nashville, Tennessee, for the appellee, Julia Leigh Tomes.

OPINION

The issue posed by Mr. Tomes on appeal is whether the trial court can "modify" a marital dissolution agreement months after the final decree of divorce incorporating the agreement was entered. We believe, however, the issue to be whether the trial court erred in its construction of the agreement when one of the parties asked the trial court to enforce it.

The parties were divorced on March 14, 2006 with an agreed Marital Dissolution Agreement ("Agreement") incorporated into the decree. Among other things, the Agreement provided for sale of the marital home with the net proceeds from the sale divided between the parties.

Thereafter, on May 15, 2006, the marital home was sold and the proceeds were used to retire the first mortgage of \$229,459.65 and the second mortgage of \$24,507.05. The remaining proceeds were then divided as per the Agreement. The attorneys for the parties were not at the closing. Wife

attended the closing but testified she did not realize the significance of the proceeds distribution at the time.

In June of 2006, Mrs. Tomes objected to use of the home sale proceeds to pay the second mortgage. Mrs. Tomes filed a motion to enforce the Agreement asking the court to find that the house sale proceeds were not to be used to pay the second mortgage and order Mr. Tomes to pay her approximately \$12,500 wrongfully withheld from her from the home sale proceeds. According to Mrs. Tomes, the Agreement required Mr. Tomes to pay the second mortgage.

The trial court agreed with Mrs. Tomes, finding that Mr. Tomes was responsible under the Agreement for the second mortgage and ordered Mr. Tomes to pay Mrs. Tomes \$12,253¹ representing the home sale proceeds withheld from her and used to pay the second mortgage. Mr. Tomes appeals. The trial court's order was stayed pending appeal.

Mr. Tomes argues that the Agreement provided that the "net proceeds" of the marital home sale be divided between them which means that any debt on the house is to be paid by the proceeds from the sale of the house. Both parties agree this is true for the first mortgage. Mr. Tomes relies on the following provision found in Section 5, Real Property:

The parties agree that when the home property is sold, the net proceeds shall be divided equally after the payment, off the top, of the 2005 timeshare fees owed, and Wife's pre-separation dental bills.

Mrs. Tomes argues that Section 14 of the Agreement governs payment of the second mortgage which provides as follows:

Debts. Each party shall be responsible for paying his or her own credit card debts and each shall hold the other party harmless and indemnify the other thereon. Husband shall pay the joint debt to First Tennessee Bank, except that Wife shall pay any charges she made.

I. LAW GOVERNING INTERPRETATION OF AGREEMENT

Provisions in marital dissolution agreements incorporated into divorce decrees which govern property settlements are agreements between parties and are subject to the same rules of construction as other contracts. *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Lopez v. Taylor*, 195 S.W.3d 627, 633 (Tenn. Ct. App. 2005); *Gray v. Estate of Gray*, 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998).

The issue before the court is clearly one of contract interpretation. The question of interpretation of a contract is a question of law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn.

¹The trial court order referred to the award as being \$12,253 and \$12,503.

1999). Therefore, the trial court's interpretation of a contractual document is not entitled to a presumption of correctness on appeal. *Allstate Insurance Company v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). This court must review the document ourselves and make our own determination regarding its meaning and legal import. *Hillsboro Plaza Enterprises v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

Our review is governed by well-settled principles. "The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used. *Allstate Insurance Company*, 195 S.W.3d at 611; *Staubach Retail Services-Southeast LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 526 (Tenn. 2005); *Guiliano*, 995 S.W.2d at 95; *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975).

All provisions of a contract should be construed in harmony with each other to promote consistency and avoid repugnancy among the various contract provisions. *City of Cookeville, Tn. v. Cookeville Regional Med. Ctr.*, 126 S.W.3d 897, 904 (Tenn. 2004); *Teter v. Republic Parking Systems, Inc.*, 181 S.W.3d 330, 342 (Tenn. 2005); *Guiliano*, 995 S.W.3d at 95. The interpretation of an agreement is not dependent on any single provision, but upon the entire body of the contract and the legal effect of it as a whole. *Aetna Cas. & Surety Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978). The entire contract must be considered in determining the meaning of any or all of its parts. *Id.*

In construing the contract, the trial court is to determine whether the language is ambiguous. *Allstate Insurance Company*, 195 S.W.3d at 611; *Planters Gin Co.*, 78 S.W.3d at 890. If the language in the contract is clear and unambiguous, then the "literal meaning controls the outcome of the dispute." *Allstate Insurance Company*, 195 S.W.3d at 611; *Teter*, 181 S.W.3d at 342; *City of Cookeville*, 126 S.W.3d at 903; *Planters Gin Co.*, 78 S.W.3d at 890. "A contract term is not ambiguous merely because the parties to the contract may interpret the term in different ways." *Staubach*, 160 S.W.3d at 526.

If, however, the language in a contract is susceptible to more than one reasonable interpretation then the parties' intent cannot be determined by a literal interpretation of the contract. *Allstate Ins. Co.*, 195 S.W.3d at 611, (citing *Planters Gin Co.*, 78 S.W.3d at 889-90). Contract language "is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Allstate Ins. Co.*, 195 S.W.3d at 611 (quoting *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)).

If a contractual language is found to be ambiguous, then a court must apply established rules of construction to ascertain the parties' intent. *Allstate Ins. Co.*, 195 S.W.3d at 611-12 (citing *Planters Gin Co.*, 78 S.W.3d at 890). "Only if ambiguity remains after the court applies the pertinent rules of construction does [the legal meaning of the contract] become a question of fact" appropriate for a jury. *Planters Gin Co.*, 78 S.W.3d at 890. In that case, a factfinder may use extrinsic or parol evidence, such as the parties' course of conduct and statements, to guide the court

in construing the contract. *Allstate Ins. Co.*, 195 S.W.3d at 612; *Stephenson v. The Third Co.*, M2002-02082-COA-R3-CV, 2004 WL 383317, at *4 (Tenn. Ct. App. Feb. 27, 2004) (no Tenn. R. App. P. 11 application filed). “If the contract is unambiguous, then the court may not look beyond its four corners to ascertain the parties’ intention.” *Stephenson*, 2004 WL 383317, at *4 (citing *Rogers v. First Tennessee Bank National Ass’n*, 738 S.W.2d 635, 637 (Tenn. Ct. App. 1987)); *Bokor v. Holder*, 722 S.W.2d 676, 679 (Tenn. Ct. App. 1986).

II. ANALYSIS

Upon review of the Agreement, we agree with the trial court that the contract is not entirely clear regarding responsibility for how the second mortgage to First Tennessee was to be paid. Section 5 states that the “net proceeds” of the sale of the home were to be distributed equally, after payment of specific debts. “Net proceeds” is not defined.² Ordinarily, the customary meaning of “net proceeds” would be those proceeds remaining after payment of debt on the house. However, we must also consider Section 14, which specifically states that Mr. Tomes would pay the “joint debt to First Tennessee Bank.” Mr. Tomes acknowledged that First Tennessee’s second mortgage was a “joint debt.” Thus, the two provisions of the Agreement create an ambiguity, because their language is susceptible to two different interpretations. As a result, the trial court correctly accepted parol evidence to clarify its terms.

The source of confusion was that there were two debts to First Tennessee, a credit card debt totaling approximately \$3,000 and a second mortgage totaling \$24,507. Mr. Tomes testified that the purpose of the second mortgage was to pay off other credit card debt incurred by the parties. The issue is which First Tennessee debt did Mr. Tomes agree to pay in Section 14 or are both debts included. The trial court concluded Mr. Tomes was responsible for both First Tennessee debts under Section 14 of the Agreement.

Mr. Tomes testified that the “joint debt to First Tennessee Bank” he agreed to pay in Section 14 of the Agreement was the credit card debt totaling approximately \$3,000. At the hearing, Mr. Tomes introduced a credit card statement from First Tennessee for the May 2006 billing period showing a total of \$3,096 owed. Mr. Tomes testified that the First Tennessee second mortgage was to be paid with the proceeds of the house sale. Mrs. Tomes said that she was never aware of this credit card debt.³ It was her belief that Mr. Tomes agreed in Section 14 to pay the home equity loan from First Tennessee Bank.

In the discovery responses provided by Mr. Tomes prior to the entry of the divorce decree, he failed to clearly state that there was a separate credit card debt owed to First Tennessee. Mr. Tomes’ January 6, 2006 responses to Mrs. Tomes’ interrogatories were made an exhibit at the

²It is unclear from the record which financial institution held the first mortgage. The settlement statement from the closing states that the \$229,459.55 payoff for the first mortgage was paid to Wells Fargo. The request for release of lien, however, on the first mortgage names the lender as First Tennessee.

³She believed any First Tennessee credit card debt that may have existed was a part of the second mortgage with First Tennessee, which was a home equity loan taken out to consolidate credit card debt.

hearing. In response to interrogatory 5, asking him to identify mortgages on any property and the outstanding balance thereon, Mr. Tomes identified only the Wells Fargo first mortgage totaling \$224,695.85. In response to interrogatory 17, asking that he identify “all debts owed by [Mr. Tomes], secured and unsecured,” Mr. Tomes listed “First Tennessee Bank loan. See attached statement” and a Discover credit card. The attached First Tennessee statement identified the second mortgage owed to First Tennessee totaling \$25,432. No reference was made to the First Tennessee credit card debt. Finally, in response to interrogatory 17 asking to identify all credit cards “you have or have had since 1999,” Mr. Tomes listed the Discover card and “Visa - First Tennessee (closed) - balance \$3,500.” In response to a Request for Production number 12 asking for “monthly statements of account for all personal and business charge cards from the last five years,” Mr. Tomes answered “No personal credit cards.” Mrs. Tomes also requested documents “evidencing [Mr. Tomes’] current indebtedness” and documents “related to any debt” in requests numbered 31 and 39, which Mr. Tomes did not answer.⁴

The bottom line is that Mrs. Tomes testified that she was not aware of the First Tennessee credit card debt, so she believed the First Tennessee debt to be paid by Mr. Tomes had to be the second mortgage. In response to an interrogatory asking Mr. Tomes to identify credit card debt, he neglected to reference the First Tennessee credit card debt and affirmatively stated elsewhere that the First Tennessee credit card debt was “closed.” It is not clear what Mr. Tomes meant when he described the First Tennessee credit card as “closed,” since he also disclosed a balance. However, when one recognizes that the interrogatory specifically included credit cards that Mr. Tomes no longer had, that Mr. Tomes said the First Tennessee credit card was “closed,” and that he failed to identify this debt when asked about existing debt, Mr. Tomes basically provided information indicating that there was no longer any First Tennessee credit card debt.

Given Mr. Tomes’ responses to discovery, it is understandable why Mrs. Tomes would be unaware of the First Tennessee credit card debt. Consequently, it is clear why Mrs. Tomes believed Mr. Tomes was agreeing in Section 14 to pay the First Tennessee second mortgage. Furthermore, even if Mrs. Tomes had been aware of both debt accounts, Mr. Tomes agreed to pay the First Tennessee debt. Since Mr. Tomes identified both the First Tennessee credit card and mortgage debt in his interrogatory responses, he was clearly aware of both debts and agreed to be responsible for the First Tennessee debt. We agree with the trial court that Mr. Tomes agreed in Section 14 of the Agreement to be responsible for all joint debt to First Tennessee.

Mrs. Tomes asked for attorney’s fees incurred in this appeal based upon the provision in the Agreement that requires a breaching party to be responsible for attorney’s fees and court costs

⁴ On appeal, counsel for Mrs. Tomes argues that her client could not have been aware that the First Tennessee second mortgage was a lien against the house since Mr. Tomes did not disclose that it was a lien in his discovery responses. Her logic is that since her client was not informed that the debt constituted a lien, then she could not have anticipated it being paid by the proceeds of the house sale. We are not persuaded by this particular line of reasoning since Mrs. Tomes acknowledges that she signed the home equity loan/second mortgage.

incurred in enforcing the Agreement. Based on the Agreement, Mrs. Tomes is awarded her attorney's fees on appeal.⁵ On remand the trial court shall determine the amount of the award.

For the foregoing reasons, the trial court is affirmed, and the case is remanded to the trial court to assess fees incurred on appeal. Costs of this appeal are taxed to the appellant, Timothy Lee Tomes for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.

⁵The trial court declined to assess attorney's fees incurred at the trial court level. That ruling was not appealed and is undisturbed.